Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

No.

KAREN DERZACK AND MICHAEL DERZACK,

Petitioners,

v.

ALLEGHENY COUNTY CHILDREN
AND YOUTH SERVICES,

Respondent

On Petition for Writ of Certiorari to the
Supreme Court of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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14 PP

QUESTION PRESENTED FOR REVIEW

Did it violate due process of law to order the withdrawal of Petitioners' Adoption Petition and Report of Intermediary upon motion of the adverse party and the Dismissal of Petitioners' Report of Intention to Adopt without a hearing, proper notice, consent or any other safeguard of due process?

PARTIES TO THE PROCEEDING

A list of parties to the proceeding in the Supreme Court of Pennsylvania is as follows:

Karen Derzack and Michael Derzack, Petitioners
c/o Kathleen A. Cribbins, Esq.
710 Fifth Avenue - Suite 2000
Pittsburgh, PA 15219

Allegheny County Children & Youth Services
933 Penn Avenue - Fifth Floor
Pittsburgh, PA 15222

Byron & Byrae Griffin
c/o Georgene Siroky, Esq.
Legal Aid for Children
900 Sarah Street - Suite 205
Pittsburgh, PA 15203

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OPINIONS BELOW

The Supreme Court of Pennsylvania filed no opinion in this case. It did issue an Order on November 25, 1997 denying Petitioners' Petition for Allowance of Appeal (Appendix 1A). Said Allowance of Appeal was filed from the Order of the Superior Court of Pennsylvania entered on April 23, 1997 (Appendix 2A) granting Respondent's Motion to Quash. No opinion was filed by the Superior Court.. The Opinion of the Hon. Joseph A. Jaffe of the Court of Common Pleas of Allegheny County is filed at Appendix 3A.

JURISDICTION

On November 25, 1997, the Supreme Court of Pennsylvania denied allowance of appeal from the decision of the Superior Court of Pennsylvania. This Petition for a Writ of Certiorari was filed within ninety (90) days of the decision of the Pennsylvania Supreme Court. This Honorable Court's jurisdiction is invoked under 28 U.S.C. Section 2106.

STATEMENT OF THE CASE

Byrae Lafay Griffin was born on July 30, 1991. Her younger brother, Byron Todd Griffin, was born on July 15, 1992. Both children are African-Americans. They were born addicted to drugs.

Byron was adjudicated dependent after his mother, LaShawn Jeffrey, abandoned him following his birth. At the age of six days, he was placed in the home of Michael and Karen Derzack, a white foster care family with Family Services of Western Pennsylvania (hereinafter "the Derzacks"). Byron stayed with the Derzacks until, in December of 1992, the Derzacks conveyed to Allegheny County Children and Youth Services (hereinafter "CYS") their desire to adopt Byron. CYS promptly notified the Derzacks that Byron would be removed from their home due to a formal transracial placement policy banning the "displacement" of African American children in white homes.

On October 6, 1994, the trial court placed both Byrae and Byron with the Derzacks as prospective adoptive parents. In a subsequent order, the trial court terminated Ms. Jeffrey's parental rights.

In 1995, CYS filed contempt petitions against the Derzacks alleging that the Derzacks had interfered with court ordered visitation, had failed to permit announced and unannounced visits of their home by CYS; had taken Byrae and Byron out of the jurisdiction without permission; had failed to correct errors on their application to adopt Byrae and Byron and had violated the court's gag order.

A hearing on the CYS contempt petitions was held before a court *en banc* on December 13, 1995. The court took the matter under advisement.

On January 17, 1996 the court announced its decision to remove Byrae and Byron from the Derzacks' care, based on testimony taken on December 13, 1995 and January 17, 1996, at the conclusion of the hearing.

The Derzacks appealed the January 17, 1996 order of court and lost in the Pennsylvania courts and a Petition for Writ of Certiorari is pending before this Honorable Court at No. 97-1105.

On August 27, 1996, Allegheny County Children and Youth Services presented its Motion to Withdraw Adoption Petition and Report of Intermediary and to Dismiss Report of Intention to Adopt before the Honorable Joseph A. Jaffe (Appendix 25A). On that date, the Honorable Joseph A. Jaffe entered an order withdrawing the Adoption Petition and Report of the Intermediary and dismissing with prejudice the Report of Intention to Adopt filed by the Derzacks. (See Appendix 33A and Appendix 40A - 70A.)

Exceptions to the August 27, 1996 Order of Court were filed in a timely fashion by the Derzacks. See Appendix 34A.

On October 7, 1996, by Order of the Court *En Banc* of the Court of Common Pleas of Allegheny

County, the Exceptions to the August 27, 1996 Order of Court were dismissed. Petitioners filed a Concise Statement of the Matters to be Complained of on Appeal. (See Appendix 37A.)

A subsequent appeal to the Superior Court of Pennsylvania raised the issue of the violation of due process and said appeal was quashed. See Brief of Appellant, Questions Presented for Review, at Appendix 71A.

The Derzacks' Petition for Allowance of Appeal to the Supreme Court of Pennsylvania was denied on November 25, 1997.

After loss of their appeal in the Pennsylvania Courts, Petitioners timely filed this Petition for Writ of Certiorari.

REASON FOR GRANTING THE WRIT

No person can be deprived of a property or liberty interest absent procedural due process. Morrissey v.

Brewer, 408 U.S. 471, 92 S.Ct. 2593 (1975). The courts have held procedural due process to be an absolute right. Carey v. Piphus, 435 U.S. 247, 98 S.Ct. 1042, 1053 (1978); Bradley v. Pittsburgh Board of Public Education, 913 F.2d 1064, 1077 (3d Cir. 1990).

The Derzacks became prospective adoptive parents following the October 6, 1994 Order of Court placing the subject minor children with them. By encouraging the type of long term parent-child relationships normally expected of biological families, the state has triggered due process protections. Santosky v. Kramer, 455 U.S. 745, 102 S.Ct. 1388 (1982) (recognizing that parents possess a fundamental liberty interest in the care and custody of their children that is protected by the Due Process Clause of the Fourteenth Amendment); Walker v. Johnson, 891 F.Supp. 1040 (M.D. Pa. 1955).

Fundamental fairness would require a hearing on the adoption petition. It is noteworthy that The Superior

Court of Pennsylvania, in its opinion on the Derzacks' appeals at In Re Griffin, 690 A.2d 1192 (1997) rejected the argument that the Derzacks lacked standing to appeal, finding instead that the Derzacks, as propsective adoptive parents, had standing to pursue their appeal

The subject order of court serves to deny the Derzacks any opportunity to be heard on their adoption pleadings, and thus violates their due process rights under the United States Constitution. Morrissey v. Brewer, supra.

Additionally, the subject order of court allows for the dismissal or withdrawal of the pleadings of one party upon motion of the adverse party without any procedural safeguards, a situation virtually unheard of in the law. See, e.g. Rule 12, Federal Rules of Civil Procedure.

It is extremely difficult to accomplish even the striking or dismissal of another's claims or pleadings absent testimony. It is a clear violation of due process of law to allow CYS and the County Law Department to

withdraw the pleadings of the Derzacks, who are, here and in other forums, parties adverse to the County, and are the Petitioners on the Adoption Petition.

Further, the subject order of court is violative of Pennsylvania law at 23 Pa.C.S.A. §2721-2724 which provides for a hearing on an adoption petition with necessary testimony and investigation.

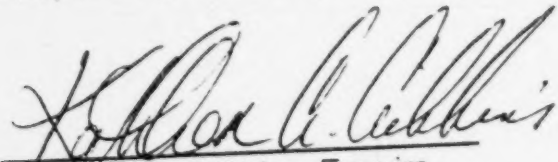
A short circuiting of the normal procedure for adoption cases served to deny the Derzacks due process of law.

Due process demands a meaningful opportunity to be heard. Armstrong v. Mango, 380 U.S. 545, 85 S.Ct. 1187 (1965). Where such a meaningful opportunity to be heard is lacking, due process is violated and the resulting order is unconstitutional.

CONCLUSION

It is respectfully requested that this Honorable Court grant review as the Petitioners were denied due process of law.

Respectfully submitted,



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On Petition for Writ of Certiorari to the
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IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

IN RE: BYRAE LAFAY GRIFFIN, BYRON TODD GRIFFIN,	: No. 325 W.D.
	: Alloc. Dkt. 1997
	:
	: Petition for
PETITION OF KAREN DERZACK AND MICHAEL DERZACK	: Allowance of Appeal from the Order of the Superior Court

ORDER

PER CURIAM

AND NOW, this 25th day of November, 1997,

the Petition for Allowance of Appeal is denied.

THE SUPERIOR COURT OF PENNSYLVANIA
OFFICE OF THE PROTHONOTARY

April 23, 1997

Wendy L. Vaupel, Esq.
Children and Youth Services
933 Penn Avenue - 5th Floor
Pittsburgh, Pa. 15222

In Re: Byrae Lafaye Griffin, etc., et al.
No. 2104 Pittsburgh, 1996

Dear Ms. Vaupel:

The court has entered the following order on your Motion to quash appeal filed in the above-captioned matter:

ORDER

"AND NOW, this 23rd day of April, 1997, this Court having considered the motion to quash appeal and all related papers IT IS HEREBY ORDERED:

THAT said motion is GRANTED.

PER CURIAM"

A Certified copy of this order will be sent to the lower court.

Very truly yours,

/s/ Eleanor R. Valecko
DEPUTY PROTHONOTARY

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

IN RE: ORPHANS' COURT

BYRAE LAFAYE GRIFFIN a/k/a BYRAE LAFAYE JEFFREY and BYRON TODD GRIFFIN a/k/a BYRON TODD JEFFREY, MINORS

No. 307-1994

PLEADING:

Opinion

FILED BY:

Hon. Joseph A. Jaffe

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IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

IN RE: ORPHANS COURT

Byrae LaFaye Griffin a/k/a
Byrae LaFaye Jeffrey and No. 307-1984
Byron Todd Griffin a/k/a
Byron Todd Jeffrey,
Minors.

JAFFE, J.

OPINION

Karen and Michael Derzack, former foster parents of the minors herein, filed this appeal of the Order of Court entered on October 7, 1996 denying Exceptions filed to the Order of August 27, 1996. On the latter date, this Court granted the Motion of Allegheny County Children and Youth Services Agency (hereinafter "C&YS") to Withdraw its Adoption Petition and the Report of Intermediary and to Dismiss its Report of Intention to Adopt. The Adoption Petition and related documents had been

filed by C&YS on March 3, 1995 when the minors were living with the Derzack family.

The instant matter has a long and complicated history and has been the subject of several exhaustive Opinions by this Court. For purposes of the current appeal, an overview of the recent history of the case will suffice.

In October, 1994, this Court placed the minors in the custody of Karen and Michael Derzack after finding that the birth mother of the minors, LaShawn Jeffrey, was unable to rehabilitate herself sufficiently to care for the children. Six months later, on April 12, 1995, this Court terminated the parental rights of Ms. Jeffrey, paving the way for the Derzack family to adopt the minors. (The father of the minors is deceased.)

Soon thereafter, C&YS filed an Adoption Petition, Report of Intermediary and a Report of

Intention to Adopt in which Karen and Michael Derzack were named as the prospective adoptive parents for the minors. Several months later, however, C&YS began receiving reports that the Derzacks were behaving in ways that were detrimental to the best interests of the children, including parading the children on tabloid television talk shows in violation of this Court's gag order, canceling the children's psychological therapy sessions, refusing to allow the children to attend court-ordered visits with their relatives, taking the children out of state without authorization and refusing to allow the adoption caseworker into their home to monitor the children. C&YS also received information that the Adoption Petition filed on behalf of the Derzacks contained fraudulent statements regarding prior mental health treatment received by Mrs. Derzack and the family's income.

Consequently, C&YS filed a Petition for Contempt which was heard by an *en banc* panel of the Juvenile Court, including this member of the Court. Following two days of hearings on December 13, 1995 and January 17, 1996, the panel determined that the Derzacks had indeed violated numerous orders of this Court and were unwilling by their own admission to comply with future Court directives. Consequently, they entered an Order removing the minors from the custody of the Derzacks.

On January 19, 1996, the Derzacks filed a Petition for Supersedeas in the Superior Court of Pennsylvania which was denied by the Court per curiam on January 24, 1996. On January 26, 1996, the Derzacks filed an appeal of the Superior Court's denial of the Supersedeas Petition to the

Pennsylvania Supreme Court which was denied on February 22, 1996.

Next, the Derzacks filed a direct appeal to the Superior Court on January 29, 1996 which is currently pending. On July 1, 1996, the Derzacks filed a Petition for Extraordinary Relief and Expedited Disposition to the Supreme Court which was denied on August 30, 1996. The Derzacks also attempted to obtain a stay of all trial court proceedings by filing emergency applications with the Superior and Supreme Courts. The applications for stays were denied by each of the Courts on August 22, 1996 and August 26, 1996.

On August 27, 1996, C&YS presented a motion to this Court to withdraw the adoption pleadings previously filed in this matter. This Court granted the motion of C&YS on that date. The Derzacks filed timely Exceptions to the Order of

August 27, 1996 which were heard by an *en banc* panel, including this member of the Court, on October 7, 1996. The panel denied the Derzacks' Exceptions on that date. It is from the Order of October 7, 1996 that the Derzacks have filed the instant appeal.

In their Statement of Matters complained of on Appeal, the Derzacks raise the following issues: (1) this Court lacked jurisdiction to enter the Orders of August 27 and October 7, 1996 and to hear the Motion of C&YS to Withdraw the Adoption Petition and accompanying pleadings; (2) the Order of August 27, dismissing with prejudice the Derzacks' Report of Intention to Adopt, impairs their ability to file for the adoption of the minors in the future and denies them the opportunity to have a hearing on the merits of the filing; (3) the Order of October 7 permits the withdrawal of the pleadings made on behalf of the

Derzacks without their consent and deprives them of a hearing on the merits of the pleadings; (4) the Order of October 7 assigns the hearing of any adoption of the minors to this member of the Court; and (5) the Order of October 7 fails to specifically preclude an adoption of the minors prior to the exhaustion of the appeals process.

The Derzacks first contend that this Court lacked jurisdiction to enter the Order of October 7, 1996 on the basis of Rule 1701 of the Pennsylvania Rules of Appellate Procedure which divests the trial court of jurisdiction during the pendency of an appeal. They submit that since both the appeal of the order terminating the parental rights of the birth mother and the appeal of the order removing the minors from the Derzacks' custody are currently pending, this Court lacks jurisdiction to hear the Motion by C&YS to Withdraw the Adoption Petition

and related documents. The Derzacks' interpretation of Rule 1701 is erroneous for two reasons.

Firsts, the orders which the Derzacks contend are on appeal are not part of the action which the Court ruled on in October, 1996. The order removing the children from the Derzacks' custody was a Juvenile Court matter docketed at Nos. 2625 of 1991 and 1608 of 1992. Though it involves the same children and the Derzack family, that case is clearly not the same as that docketed in Orphans' Court involving the adoption of the children. Further, the second order in which this Court terminated the parental rights of the children's birth mother is also not the identical action [11] from which the Derzacks filed the instant appeal. Although it is docketed in the Orphans' Court, the termination order is collateral to the issue of the withdrawal of the Adoption Petition and related documents.

Pursuant to Rule 1701(b) 1, the trial court may take any other action ancillary to the appeal. Clearly, permitting the agency with custody of the minors to withdraw the documents which would have allowed the family from whom the children were removed to adopt those children is ancillary to the question of whether the order terminating the birth mother's parental rights was proper. Consequently, the appeals of the two related orders cannot divest this Court of jurisdiction to enter the Order of October 7, 1996.

Secondly, Rule 1701(c) provides that the appeal of only one "item, claim or assessment" adjudged in a matter prevents the trial court from proceeding with only such item, claim or assessment. Thus, in addition to being collateral to the adoption proceedings, the orders on appeal involving the termination of parental rights and the removal of the

minors from the Derzacks' custody adjudge separate "items" or "claims" from the withdrawal motion filed by C&YS. This interpretation of Rule 1701(c) is consistent with the purpose of the Rule as enunciated by the Pennsylvania Supreme Court in Rosen v. Rosen, 520 Pa. 19, 549 A.2d 561 (1988). In Rosen, the Court stated that the purpose of that section of the Rule was to "prevent appeals of collateral issues from delaying the resolution of the basic issues where the proceeding below can continue without prejudicing the rights of the party seeking the interim review." Id, 549 A.2d at 564.

In this case in particular, there are a multitude of issues involved and appeals are taken from almost every decision made. If the trial court were prevented from continuing to make determinations which are necessary to insure that the children's best interests are being served, they would suffer

tremendous harm. Moreover, the Derzacks would suffer no prejudice from the withdrawal of the Adoption Petition since the falsehoods contained in it[1] essentially nullify it and they no longer have custody of the children. If they should prevail on their appeal of the order removing the minors from their custody, a new Adoption Petition could be filed at that time.

Finally, the Superior and Supreme Courts also determined that the Derzacks would suffer no prejudice from the trial court's exercise of jurisdiction since they denied the Derzacks' emergency applications for a stay in this matter. Indeed, the only parties who would suffer prejudice of the trial court were divested of jurisdiction relating to this case are the minors who sorely need the

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[1] The Derzacks admit providing false information on the Adoption Petition concerning Mrs. Derzack's psychiatric history and the family's income.

benefit of a jurist thoroughly familiar with their history.

The Derzacks next assert that this Court lacked jurisdiction to enter the Order of October 7 because the court order assigning this member of the Court to the Orphans' Court allegedly expired upon entry of the order terminating the birth mother's parental rights to the children. Further, they contend that the assignment of this member to the Civil Division of the Court of Common Pleas "effectively ended his role" in this matter. Once again, the Derzacks' argument lacks merit.

As a result of this Court's long-standing involvement in the dependency proceedings of the minors herein, this Court was assigned pursuant to the Administrative Order of Court of July 13, 1987, to hear the Petition for Termination of Parental Rights in Orphans' Court in the instant case. In connection with the dependency proceedings in Juvenile Court,

this Court continues to monitor and make determinations regarding the welfare of the minors herein. One of those duties includes the monitoring of actions of C&YS in whose custody the minors herein are entrusted. Indeed, it was this Court who ordered C&YS to begin adoption proceedings on behalf of the Derzacks when it became clear to this Court that the birth mother would not be able to parent her children. Despite its assignment to the Civil Division, this Court has continued to oversee the matter throughout the various appeals and other legal actions. In light of this, the Administrative Judges of both the Orphans' Court and the Family Division advised the counsel for C&YS to present C&YS's Motion to Withdraw the same Adoption Petition to this member of the Court. This action was entirely consistent with the Administrative Order of Court providing for the original assignment and with

the spirit of the law as enunciated by the Superior Court in In Re Quick, 384 Pa. Super. 412, 559 A.2d 42 (1989) (The assignment of the judge who presided over the dependency and disposition proceedings in Juvenile Division to sit in the termination proceeding is an effective and expeditious way to process these matters).

In their assignment of error, the Derzacks contend that the Order of October 7 violates their due process rights by denying them a hearing on the merits of the Adoption Petition. To the contrary, a review of applicable case law, including a very recent decision by the Superior Court, leads us to conclude that the Derzacks lack standing to contest the withdrawal of the adoption pleadings.

In In Re Adoption of Baby Boy Wims, filed on November 26, 1996, the Superior Court held that a couple who, like the Derzacks, no longer had custody

of a child and who did not receive the consent of the child's guardian, lacked in loco parentis standing to pursue the adoption of the child. In determining whether the former foster parents of the child in Wims stood in loco parentis to that child, the Court quoted another of its recent decisions, Cardamone v. Elshoff, 442 Pa. Super. 263, 659 A.2d 575 (1995), as follows:

> The phrase "in loco parentis" refers to a person who puts himself in the situation of assuming the obligation incident to the parental relationship without going through the formality of legal adoption. The status of "in loco parentis" embodies two ideas: first, the assumption of a parental status, and second, the discharge of parental duties.

Id., 659 A.2d at 581.

While the Derzacks may have stood in loco parentis to the children from the time they obtained physical custody of them until C&YS removed them from the Derzack home in January, 1996, they clearly no longer retain that distinction. Just as in the Wims

case, the Derzacks have no contact with the children, do not have physical custody of them and are not responsible for any decisions made on their behalf. They, therefore, have no parental relationship with them. Secondly, Section 2711(a)5 of the Adoption Act requires that the child's guardian or the persons having custody of the child consent to the adoption. It is clear that the Derzacks have neither the consent of the persons with physical custody of the children (the current foster family with whom the children reside) nor from the agency which functions as the legal guardian. Accordingly, they cannot proceed with the Adoption Petition as filed by C&YS on their behalf.

In addition to the Wims decision, cited above, Pennsylvania courts have consistently denied foster parents standing in matters relating to their foster children. See, In the Interest of G. C., ___ Pa.

Super. ___, 673 A.2d 932 (1996); In Re Adoption of S.C.P., 364 Pa. Super. 257, 527 A.2d 1052 (1987); Priester v. Fayette County Children and Youth Services, 354 Pa. Super. 562, 512 A.2d 683 (1986). The Pennsylvania Supreme Court has recently affirmed that foster parents lack standing to pursue adoption without the agency's consent in Chester County Children and Youth Services v. Cunningham, 431 Pa. Super. 421, 636 A.2d 1157 (1994), aff'd 540 Pa. 258, 656 A.2d 1346 (1995).

Beyond the standing issue, the Derzacks have no due process rights to a hearing on the petition because the adoption pleadings are those of C&YS, prepared and filed at a time that C&YS had consented to the adoption of the minors by the Derzacks. C&YS files such pleadings on its own behalf to, as it states in its brief, "facilitate an adoption of dependent children in its custody". The

pleadings are "prepared and filed by C&YS counsel for the benefit of the agency and the dependent children in its legal custody , and as a courtesy to the adoptive foster parents". Id.

Citing Chester County v. Children and Youth Services, supra, the Derzacks contend that C&YS is unreasonably withholding its consent to adoption in this matter and that to permit such action by an agency would set a precedent for the agency controlling the Court. The Derzacks' contention is belied by the record that it was this Court who removed the children from the Derzacks' custody in the first place for their actions in violating numerous orders of court as set forth above and refusing to agree to abide by court orders in the future. This Court could not and would not, based on the record, find that C&YS's refusal to consent to the adoption by the Derzacks is in any way unreasonable. Thus, we

find no merit in the argument put forth by the Derzacks.

Further, the Derzacks were provided with a full and fair opportunity to be heard on the merits of the contempt motion filed by C&YS in the fall of 1995 which set in motion the chain of events which led to the withdrawal of the Adoption Petition. They made it very clear to this Court at the contempt hearings that they were not acting in the best interest of the children and that, in fact, their actions were harming the children. Consequently, the en banc panel removed the children from their custody which effectively stripped them of their in loco parentis designation.

In their next assignment of error, the Derzacks contend that this Court lacked jurisdiction to enter the subject Order of Court and assign the hearing of the adoption of the minors herein to this member of the

Court. As set forth at length in the section of this Opinion dealing with jurisdiction, this Court was properly assigned to hear this matter as the judge of long-standing record in this case. The Derzacks cite no authority for their contention that this decision by the Administrative Judges of the Civil and Orphans' Courts was in any way contrary to the authorizing statute or legal precedent.

Finally, the Derzacks contend that the subject Order of Court fails to preclude an adoption of the minors herein prior to the exhaustion of the appeals process and thus, fails to preserve the status quo. The Derzacks' contention is completely without merit as the August 27, 1996 Order of Court states the following, in pertinent part:

> (2) Adoption not to occur until
> (a) Final order on T.P.R.
> (b) Final order in juvenile Court case

Thus, no adoption of the minors herein will occur by the clear and unambiguous wording of the Order itself until the two orders on appeal regarding the termination and the removal from the Derzacks' custody are finally adjudicated in the appellate courts.

Consequently, the Order of October 7, 1996 by this Court was properly entered.

Date filed: January 3, 1997

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

IN RE:

BYRAE LAFAYE GRIFFIN a/k/a BYRAE LAFAYE JEFFREY and BYRON TODD GRIFFIN a/k/a GRIFFIN a/k/a BYRON TODDJEFFREY,

minors

ORPHANS' COURT
DIVISION
No. 307 of 1994

MOTION TO WITHDRAW ADOPTION PETITION AND REPORT OF INTERMEDIARY AND TO DISMISS REPORT OF INTENTION TO ADOPT

Filed on behalf of:

Children & Youth Services
of the Allegheny County
Institution District

Counsel of Record for this
Party:

KERRY FRAAS
County Solicitor
PA I.D. 23395

WENDY L. VAUPEL, ESQ.
PA I.D. 44817

Children & Youth Services
933 Penn Avenue, 5th Floor
Pittsburgh, PA 15222
(412) 350-5880

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA
ORPHANS' COURT DIVISION

IN RE:	)	
	)	
BYRAE LAFAYE GRIFFIN	)	NO. 307 of 1994
a/k/a BYRAE LAFAYE JEFFREY	)	
and BYRON TODD GRIFFIN	)	
a/k/a BYRON TODD JEFFREY	)	
minors.	)	

MOTION TO WITHDRAW ADOPTION PETITION AND REPORT OF INTERMEDIARY AND TO DISMISS REPORT OF INTENTION TO ADOPT

AND NOW comes Petitioner, Allegheny Children & Youth Services, by and through its counsel, KERRY FRAAS, County Solicitor and WENDY L. VAUPEL, Esquire and respectfully presents as follows:

1. Children & Youth Services (CYS) is the legal custodian of the above named dependent children. See copies of dependency orders attached as Exhibits A-1 and A-2.

2. Pursuant to Juvenile Court Orders of October 5 and 6, 1994, Byron and Byrae were placed in the home of Michael and Karen Derzack (The Derzacks) for adoptive foster care.

3. On March 3, 1995, CYS filed an Adoption Petition and Report of Intermediary on its behalf and for the Derzacks. The Derzacks themselves had filed a Report of Intention to Adopt in this matter.

4. During the period from May 1995 through January 1996, the Derzacks violated eight (8) Juvenile Court Orders designed to further the physical, intellectual, spiritual and moral well-being of these children.

5. In response to said violations of court orders, CYS filed four (4) contempt petitions in juvenile court seeking sanctions against the Derzacks and further, requesting that the court determine

whether placement with the Derzacks was in the best interests of these children.

6. During said period, CYS also learned that the Derzacks supplied false information on the adoption petition and the adoption application with regard to questions concerning Mrs. Derzack's mental health history and the couples' annual income. Therefore, the Derzacks' fraudulently induced the agency to file these documents for them.

7. Specifically, the Derzacks answered "no" to the question "whether any members of your immediate family including yourself ever received professional counseling or therapy" on the adoption application, and further they provided a figure for their annual income which contradicted that given to the Internal Revenue Service. In fact, Mrs. Derzack has received mental health

therapy, and the Derzacks have since admitted that the Internal Revenue Service figures are the correct figures, thus the figure which they provided to CYS and the Court is false. See copy of Pittsburgh Post Gazette article "Ignorance of Tax Fakery Claimed" by Marylynne Pitz dated July 19, 1996 attached as Exhibit B.

8. At a December 13, 1995 and January 17, 1996 hearing held concerning the Derzacks' violations of court orders and the best interests of the children, the Derzacks denied their false statements on the Adoption Petition and application, and Mr. Derzack took the Fifth Amendment with regard to the couple's annual income. See copies of relevant pages in hearing transcript attached as Exhibit C.

9. At the conclusion of the hearing, the juvenile Court *en banc* removed Byron and Byrae from the

Derzacks' physical custody and placed them in an adoptive home where they have resided for the last six months.

10. The Court *en banc* removed the children finding that it was in their best interests pursuant to 42 Pa. C.S.A. Section 6351. The Court *en banc* also determined that the Derzacks have disqualified themselves as adoptive parents for Byron and Byrae finding that they were "unfit" to serve as same. The Derzacks have appealed the Court *en banc's* decision to the Superior Court of Pennsylvania where it is now pending.

11. Pursuant to the Court en banc's Order, and due to the material falsehoods perpetrated on the Court and the agency, CYS formally withdraws its consent to the adoption of these children by the Derzacks.

12. The current adoptive foster family desires to adopt these children.

13. CYS plans to file an Adoption Petition, Report of Intermediary and Report of Intention to Adopt on its behalf and for the current adoptive family.

14. Orphans' Court has advised CYS that the Derzacks' filings must be withdrawn or dismissed before an agency can file an Adoption Petition, Report of Intention to Adopt and Report of Intermediary for the current foster adoptive family.

15. The children's attorney, Georgene Siroky, Esquire has no objection to the withdrawal of the Adoption Petition and Report of Intermediary filed by CYS for the Derzacks and the dismissal of the Report of Intention to Adopt filed by the Derzacks.

WHEREFORE, based upon the foregoing, CYS respectfully requests this Honorable Court order that the Adoption Petition and Report of Intermediary

be withdrawn and that the Report of Intention to Adopt filed in this matter be dismissed.

Respectfully submitted,

KERRY FRAAS
County Solicitor

/s/ Wendy L. Vaupel, Esquire
Counsel for Allegheny County
Children and Youth Services

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA
ORPHANS' COURT DIVISION

IN RE:	)	
	)	
BYRAE LAFAYE GRIFFIN a/k/a	)	No. 307 of 1994
BYRAE LAFAYE JEFFREY and	)	
BYRON TODD GRIFFIN a/k/a	)	
BYRON TODD JEFFREY,	)	
minors.	)	

ORDER OF COURT

AND NOW, this 27th day of August, 1996, it is ORDERED, ADJUDGED and DECREED that based upon the foregoing, the Adoption Petition and Report of Intermediary filed for Michael and Karen Derzack in the above matter are withdrawn. It is further ORDERED that the Report of Intention to Adopt filed by Karen and Michael Derzack is dismissed with prejudice.

1. Any adoption of the above-named children to be heard by the undersigned.
2. Adoption not to occur until
    a. Final Order in T.P.R.
    b. Final Order in Juvenile Court Case

By the Court:

/s/ Jaffe J.

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA
ORPHANS' COURT DIVISION

IN RE:	)	
	)	
BYRAE LAFAYE GRIFFIN a/k/a	)	No. 307 of 1994
BYRAE LAFAYE JEFFREY and	)	
BYRON TODD GRIFFIN a/k/a	)	
BYRON TODD JEFFREY,	)	
minors.	)	

EXCEPTIONS TO THE AUGUST 27, 1996
ORDER OF COURT
TO BE ARGUED BEFORE THE COURT, EN BANC

AND NOW COME Karen Derzack and Michael Derzack, by and through their counsel, Kathleen A. Cribbins, Esquire, and file Exceptions to the Order of Court heretofore entered on August 27, 1996, in the following particulars:

. . .

3. The subject Order of Court provides for the dismissal with prejudice of the Report of Intention to Adopt filed by Karen and Michael Derzack, and thus, precludes the filing of any further report of Intention

to Adopt by Karen and Michael Derzack, and thus, is prejudicial to the Derzacks and substantially impairs their ability to file for the adoption of the subject minors at any time in the future. Further said Order of Court allows for said dismissal without affording the Derzaks the opportunity of having a hearing on the merits of the filing.

4. The subject Order of Court allows for the withdrawal of the pleadings and filings made on behalf of Karen and Michael Derzack without the consent of Karen and Michael Derzack, and thus, deprives Karen and Michael Derzack of a hearing on the merit of the pleadings and filings.

. . .

8. The subject Order of Court has impaired the standing of Karen and Michael Derzack before the Court of Common Pleas of Allegheny County.

. . .

WHEREFORE, Karen and Michael Derzack respectfully request a hearing before the court, en banc, on the within Exceptions, and the vacating of the Order of Court of August 27, 1996.

Respectfully submitted,

/s/ Kathleen A. Cribbins, Esq.

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

ORPHANS' COURT DIVISION

IN RE:	)	
	)	
BYRAE LAFAYE GRIFFIN a/k/a	)	No. 307 of 1994
BYRAE LAFAYE JEFFREY and	)	
BYRON TODD GRIFFIN a/k/a	)	
BYRON TODD JEFFREY,	)	
minors.	)	

ORDER OF COURT

AND NOW, to wit, this 7th day of October, 1996, it is hereby Order and Decreed that after submission of briefs and oral argument before the undersigned, the Exceptions filed in the above-captioned matter are dismissed.

By the Court,

/s/ Robert A. Kelly, J

/s/ I. Martin Wekselman, J.

/s/ Joseph A. Jaffe, Judge

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

IN RE: Orphans Court Division

Byrae Lafaye Griffin, a/k/a
Byrae Lafaye Jeffrey and No. 307 of 1994
Byron Todd Griffin a/k/a
Byron Todd Jeffrey,

Minors

CONSISE STATEMENT OF MATTERS TO BE
COMPLAINED OF ON APPEAL

AND NOW COME Karen Derzack and Michael Derzack, by and through their counsel, Kathleen A. Cribbins, Esquire, and file this Concise Statement of Matters to be Complained of on Appeal, in the following particulars:

. . .

3. The subject Order of Court provides for the dismissal with prejudice upon motion of adversarial party of the Report of Intention to Adopt filed by Karen and Michael Derzack, despite the pendency of the appeal, and is prejudicial to the Derzacks and

substantially impairs the ability to file for the adoption of the subject minors at any time in the future.

4. Further, the subject order of court allows for the dismissal with prejudice of the Right of Intention to Adopt without affording the Derzacks the opportunity of having a hearing on the merits of the filing.

5. The subject Order of Court allows for the withdrawal by an adverserial party of the pleadings and filings made on behalf of Karen and Michael Derzack without the consent of Karen and Michael Derzack, and deprives Karen and Michael Derzack of a hearing on the merit of the pleadings and filings.

Respectfully submitted,

/s/ Kathleen A. Cribbins, Esq.

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

JUVENILE SECTION

BYRON JEFFREY
BYRAY GRIFFIN

PROCEEDINGS:
Motion

DATE: August 27, 1996

REPORTED BY:
Lisa J. Van Scyoc, RPR
Official Court Reporter

HELD BEFORE:
Hon. Joseph Jaffe

COUNSEL PRESENT:

For CYS:
Wendy L. Vaupel, ACS

For Byron Jeffrey and
Byrae Griffin:
Georgene Siroky, Esq.

For Karen and Michael Derzak:
Cathy Cribbins, Esq.

PROCEEDINGS

THE COURT: All right, Ms. Vaupel.,

MS. VAUPEL: Your Honor, I'm presenting a motion today to withdraw the adoption petition and the report of intermediary which Children and Youth Services filed on behalf of Karen and Michael Derzak.

I'm also asking that the Court dismiss their report of intention to adopt that they filed. CYS is making this request, your Honor, because it is withdrawing its consent to the adoption of Byron and Byrae by Mr. and Mrs. Derzak.

The withdrawal of the consent is based upon the fact that juvenile court en banc in January in 1996 removed the children from the Derzaks' physical custody in the best interest determination.

In addition, Your Honor, it was shown at that January 17, 1996 hearing that the adoption petition which had been filed for Byron and Byrae on behalf of the Derzaks is, in fact, a fraudulent document and based upon fraudulent information.

Therefore, the agency desires to withdraw that document. The Derzaks will not be prejudiced if the documentation is withdrawn. In the event that they should prevail on appeal in this matter and the children should be returned to them, they may then file their own adoption petition, which I would assume would be accurate, and they can proceed to adopt the children without benefit of this agency's consent.

But at this time, based upon Chester County versus Cunningham, we are asking to formally withdraw this petition as we formally withdraw our consent to the adoption of Byron and Byrae by Karen and Michael Derzak.

THE COURT: Ms. Siroky?

MS. SIROKY: Your Honor, it would be my position that it is entirely within the rights of a party who has filed a petition to withdraw the petition for any reason that they see fit. That's basic procedural law.

I would agree with Ms. Vaupel that there is no prejudice accruing to that on the part of the Derzaks, and I would also consent that such a move is beneficial to my clients so that they might then be placed in a posture where whatever the result of the Superior Court appeal is, the prevailing party can immediately move to file an appropriate valid petition.

THE COURT: Okay. Attorney Cribbins?

MS. CRIBBINS: Your Honor, CYS has indicated in its own petition that it contacted orphans court with regard to filing an adoption petition on behalf of the current foster family. And they were

informed that the pleadings with regard to the Derzaks must be withdrawn before they can do so.

They've indicated that they intend in their own petition – They've indicated that they intend to file an adoption petition regarding the intermediary report of intention to adopt on behalf of the current family.

It would be prejudice to the Derzaks for the case to be placed in such a posture where these pleadings could be filed. If they prevailed on appeal, you may have a situation where the children are returned to the custody of the Derzaks, someone else has an adoption petition in place or there's already an adoption which has gone through.

The point that a party has the right to withdraw whatever petition it has filed, what we have here is the Derzaks, I believe, filed the adoption petition, not CYS. They do not wish to withdraw anything that they filed.

The situation is such, of course, Your Honor, is aware this case is on appeal. If the Derzaks fail to prevail before the Superior Court, they will go on to the Supreme Court.

The Chester County case, as I'm sure Your Honor is aware, comes from a divided Supreme Court, and part of the reasoning of the justices who filed opinions of the Superior Court action was that you can't have an agency making a decision like that and taking the power away from everyone reasonably. You can't have a situation where an agency reasonably or unreasonably withdraws consent and that's the end of the matter.

I would submit that the Court does not have jurisdiction because of the current appeal, and this is not a collateral matter. And I don't believe that the Court can act on this at this time pending the appeal.

Further, I would have to respectfully submit that the November 1994 order covers only the termination proceedings with regard to Lashawn Jeffrey, and that the motion of this nature should more properly be presented in orphans court.

THE COURT: It's being presented in orphans court today. I'm sitting as an orphans division judge.

MS. CRIBBINS: My point was the only order that I have—

THE COURT: Let me have the cite for the Chester County, please.

MS VAUPEL: Yes, Your Honor, it's 540 PA 256.

THE COURT: Give me the A.2nd.

MS. VAUPEL: 565 A.2nd Reporter, second 1346. And, Your Honor, I have a copy for the Court.

THE COURT: I was going to say Ray could just pull it. If it's right there. What else, Attorney Cribbins? Anything else?

MS. CRIBBINS: Nothing else, Your Honor.

MS. VAUPEL: - Your Honor, if I may respond to Ms. Cribbins. One only has to look at the cover sheet of the adoption petition to know that it was filed on behalf of this agency. I don't have it attached there, Your Honor, but I have the actual petition with me, a copy of it.

I filed this petition. My name is on this petition, Timothy Puhl's name was on this petition, Ira Weis' name was on this petition. We are listed as counsel of record.

It states "petition for adoption filed on behalf of Children and Youth Services for petitioners Michael and Karen Derzak." We filed this as a courtesy to Mr. and Mrs. Derzak. In the event that termination

was upheld on appeal or is upheld on appeal, they would not have to hire counsel to proceed with the adoption.

This is our adoption petition. Our consent is contained. We are withdrawing our consent.

We do not consent of any adoption of Byron an Byrae by the Derzaks. Furthermore, this Court has jurisdiction in this matter pursuant to the adoption act and pursuant to the juvenile act. In fact, legislation is going to become effective in September of 1996 which allows juvenile court judges –

THE COURT: That's not the issue. The jurisdiction is under the appellate rules whether I retain jurisdiction; not whether I have it in the first instance, because if case is on appeal, am I divested.

MS VAUPEL: You're not divested. This is a different issue.

THE COURT: Direct yourself to that.

MS. VAUPEL: This is a different issue. Whether or not the children were properly removed in their best interest from the Derzaks is a separate issue whether or not CYS can withdraw their own adoption petition and own documentation in this matter.

MS. SIROKY: It's not only a different issue, a different case, different case numbers, it's filed in two different divisions of the court. The action of the juvenile court was pursuant to the juvenile court dependency case, and it is your duty to regularly review the children and make sure that placements were appropriate.

That has nothing whatsoever to do with actions proceeding in orphans court on an adoption. Those are completely separate cases. And the courts have always treated them completely separate.

MS VAUPEL: Furthermore, Your Honor, the Derzaks' appeal – excuse me. They ask for a stay on this particular issue with regard to the adoption in the Superior Court and the Supreme Court, and they were denied.

THE COURT: The Supreme Court hadn't ruled, have they?

MS VAUPEL: They ruled at 4:30 p.m. yesterday upon receipt of an answer to the Derzak petition.

THE COURT: Do you have an order?

MS VAUPEL: I have a verbal order.

MS. CRIBBINS: That doesn't mean they won't prevail on appeal.

THE COURT: That means they didn't by the divestiture of jurisdiction. That part's no problem. They didn't stop me from acting or haven't stopped me from acting.

MS CRIBBINS: The case law indicates they have to indicate they would prevail on appeal in order to get a stay. I don't believe that indicates that the Supreme Court is indicating you have jurisdiction on this matter, clearly not collateral.

THE COURT: One of the ways to obviate the prejudice would be – and if, in fact, I decide to grant the relief would be to do a couple things. One would be to assign the adoption to me despite – maybe Judge Kelly would make an exception even though they don't generally want to do that.

The TPR, juvenile courts hear it. That way I would be able to control it and proceed with it until there was a final order on appeal. Two, the TPR is still pending the fact the fact that you had filed something in orphans court.

You can't do anything until there is a final order from the Supreme Court on the TPR. That is the built-in protection.

MS. VAUPEL: I'm, also, Your Honor, after thinking this through, CYS – and given the factors as they are today – would probably not file documentation – adoption documentation on behalf of the current foster adoptive family until final orders are received. Just because we would not want to proceed with an adoption and then jeopardize the adoption should the Superior or Supreme Court rule in the Derzaks favor.

MS CRIBBINS: Then, Your Honor, there is absolutely no reason for this motion.

THE COURT: There is, it should have been contemporaneous with the January 17th decision. It follows logically, morally and legally that

when children are removed from a caretaker, those caretakers can't adopt.

So it's automatic – it would have been automatic. The fact that no one acted doesn't make it any more likely, but that's what the court en banc interpreted. That's what the law intends.

There would be no reason to keep caretakers who lost custody of children.

MS. CRIBBINS: If they prevail –

THE COURT: If if if if. So far there is no indication that they are going to. It's a court en banc. Are the briefs filed yet or is argument pending?

MS CRIBBINS: Yes, I don't think there is a date yet.

MS VAUPEL: There is no indication at all that the Superior Court is at all going to reverse the court

en banc. Each decision, each review, each appeal in this case had been, you know, had been affirmed.

MS. CRIBBINS: There is no indication that they are not going to prevail.

MS. VAUPEL: They didn't grant a stay in the very beginning. Yes, there is. in this case had been, you know, had been affirmed.

MS. CRIBBINS: No.

THE COURT: You can't predict it. It's impossible to predict. All I know is three opinions were filed. Four opinions have been filed, three had been affirmed by courts, and petitions for – well, one petition for allowance of appeal is pending.

MS. SIROKY: It doesn't matter, Your Honor, whether or not –

THE COURT: Two of the three of us had written. I don't know if the third judge is writing or not. He says he's going to. He hadn't. I can't think

of any scenario where a three judge panel would be reversed. That's why there is an appellate order.

MS. CRIBBINS: What you're allowing, you're allowing CYS to withdraw pleadings filed by someone else.

MS VAUPEL: That's not true.

THE COURT: That's not true. In fact, your cover sheets are attached to your answer to the stay. I knew I had seen them.

MS. VAUPEL: Yes, they are.

THE COURT: No, no. All I did, I said if CYS was not going to do it, then I was ordering them and orphans court to accept Mr. Bloom's files on behalf of the Derzaks. If they weren't going to do it, I was going to permit the Derzaks to do it and CYS went through with it. But your client can't file anything.

MS. CRIBBINS: But the petitioners are the Derzaks, the petitioners are not CYS. That's like saying an attorney is the petitioner.

THE COURT: They are only petitioners to the extent that I allow them to be petitioners. They don't have any independent standing, and they didn't have any independent standing from CYS except from CYS. CYS was reluctant, wasn't going to obey what I told them to do. That's been the problem in the case the whole time from the first time that Byron was placed with them.

MS. CRIBBINS: I would suggest that a reading of the Chester County case would indicate that there may be a change in that law.

THE COURT: They are out of custody. They've been out of custody since January 17th. The only logic to it is they can't and they are not going to

be able to unless there is a reversal. Now they have no standing.

MS. VAUPEL: If there is a reversal –

MS. CRIBBINS: There is no need to change the status quo.

MS. SIROKY: You can't assume there will be a reversal. An order is –

MS. CRIBBINS: You can't assume it's – the order is valid until the day it is reversed. You can't assume that the order is going to become invalidated.

MS. VAUPEL: The documentation is fraudulent. In any event, even if they did win the appeal, they'll have to file new documentation.

THE COURT: I don't know if you're – the issue is the stay with supersedeas. There is no – the case en banc law is the lower court is the lower court until there is supersedeas.

MS. SIROKY: And it's valid.

THE COURT: The assumption is that the lower court's going to be upheld, not reversed. That's why there is a whole – there is a whole body of law that involves the issue of supersedeas.

MS. CRIBBINS: But –

THE COURT: Be that as it may, the built-in protection will be there in three things; one will not be in the order if I enter it, and that is, that they can file themselves. That's not an issue. I'm going to ask for the adoption. That will certainly be Judge Kelly's beck and call, but I don't think – I don't see any reason why he won't allow me to stay in control since he and Judge Baer and Judge Musmanno actually directed this petition to me as opposed to me seeking it out.

MS CRIBBINS: Is there an order to that effect:

THE COURT: I think they were approached informally. I didn't hear.

MS. CRIBBINS: The order that I have indicates you are appointed for the termination proceeding, and after that the orphans court is to be notified of the names of counsel and parties.

THE COURT: What order is that?

MS. CRIBBINS: November 11 of '94 order. It doesn't say as I read that you would have the –

THE COURT: I think you have to – you'd have to – it's a form order. It's a boiler plate order that you seek each time that a juvenile court judge is assigned.

MS. CRIBBINS: The order?

THE COURT: Yes. Isn't it.

MS. CRIBBINS: No, it's –

MS. SIROKY: Yes, it is. It's used in every case.

MS. VAUPEL: Your Honor, if I may shed some light on this. I informally approached Judge Baer and Judge Kelly and asked them whether I should present this to you or to Judge Kelly. And both judges indicated to present it to the court – to this Court of this Court was, in fact willing.

MS. CRIBBINS: But this order was only until the termination.

THE COURT: It doesn't say that. It doesn't restrict me.

MS. CRIBBINS: For the purpose of hearing a termination proceeding in the above captioned matter.

THE COURT: I've had no contact or – let the record indicate I've had no contact with anyone at all on the issue. All I know is my office was contacted for a time to present - I gave them the time to present. I've gotten no order that prohibits me. It

certainly makes sense and it's logical that I would hear this petition. But neither of the three AJ's have stopped me.

I'm going to enter an order. If you think you have relief somewhere else, that's up to you. Anything else?

MS. CRIBBINS: Yes, Your Honor. If you've entered that order, we still have only word from CYS that it probably will not file these pleadings. If it files the pleadings, that puts the current adoptive – current foster family in a different posture. It's prejudice to the Derzaks.

MS. SIROKY: Regardless of whether it is or not, Your Honor –

MS. CRIBBINS: Excuse me. And it may prevent them from filing their own petition, and that is prejudice to them.

MS. SIROKY: Your Honor, every action the Court takes adverse to a parties' request is prejudice to that party. Whether it's prejudice isn't the issue today. It's whether or not CYS is entitled to withdraw a pleading that it filed.

THE COURT: The other thing that's clear is if, in fact, you're successful on appeal, there's going to be very specific instructions from the Superior Court or Supreme Court.

They are going to order – they are going to say you may proceed with the adoption or you may not. If the Superior Court orders, you may proceed with the adoption, all of the stuff is going to be muted out.

There is no prejudice. They can file whatever they want. They can have the kids adopted, you know, in Mars if they want. But if I retain jurisdiction or if I order that Mary Ann whatever her name is is

required by my order to let me proceed with the adoption, then I'm going to wait.

There can't be an adoption if there is not a final order from the appellate courts.

MS. CRIBBINS: We ask for notification for the filing of anything, and that also that does not clear up the problem what if you're not appointed.

THE COURT: As of January 17th that's it for your clients. That's the problem. The decision was made. That's it. They don't have custody of these kids. And it's been more than eight months.

MS. VAUPEL: And they are not entitled to any notice.

THE COURT: That's why I responded in the way I did. They are not parties. They are not parties, they don't have standing. And that's the end of it. You have a case on appeal in the Superior

Court. We'll wait and see. Is it going to be argued in September?

MS. SIROKY: We don't know.

THE COURT: Is it ripe yet? The records up, isn't it?

MS. SIROKY: Yes.

MS. VAUPEL: Yes.

MS. SIROKY: And all the briefs are in.

MS. VAUPEL: We're waiting for an argument date. We expect September or October.

MS. CRIBBINS: But still the problem with this is CYS can go ahead and file and we will receive no notice.

THE COURT: You're not entitled to.

MS. CRIBBINS: We will not be in position to file any motion to stay on that.

THE COURT: You wouldn't be entitled to.

MS. CRIBBINS: But it directly affects this on top of that, if you're not appointed to the adoption.

THE COURT: I'm appointing myself right now. I'm appointing myself right now to do the adoption. Okay. Adoption is not to occur until final order. Okay.

MS. VAUPEL: Your Honor, does this also include the Derzak's report of intention to adopt?

THE COURT: Whatever. It's your order.

MS. CRIBBINS: That would be a motion to dismiss their pleading.

MS. VAUPEL: Yes. I'm asking for that pursuant to Chester County.

MS. CRIBBINS: Chester County is not clear, and I don't they can dismiss a pleading filed by somebody else.

MS. VAUPEL: It is clear.

MS. SIROKY: Her copy is as clear as the Supreme Court gets. Counsel may not like the fact it was a divided court. Nevertheless, the decision stands as it was made.

MS. CRIBBINS: I like the fact it was a divided court, but you can't dismiss somebody else's pleadings.

THE COURT: Is it a pleading or is it a piece of paper? Is it a piece of paper required by the orphans court?

MS. CRIBBINS: It's a piece of paper required by orphans court. It's filed.

MS. VAUPEL: I would point out on 1349 of Chester County "We held an S.C.P., which describes who may file a report of intention to adopt. Does not encompass foster parents." We reiterate it.

"Foster parents have no standing to adopt a child placed in their custody until the absolute,

unequivocal written consent of children's legal custodian or other person whose consent was necessary as given."

Well, it was given and it's now withdrawn.

MS. CRIBBINS: And if you look at the opinions of the other justices, they say you cannot go merely on reasonable or unreasonable consent of an agency and take that power away from the court. It's a divided court.

THE COURT: Two of the three of them are gone. What's the point?

MS. CRIBBINS: Who knows what the new justices are going to do.

THE COURT: You would argue that four three really means three four.

MS. CRIBBINS: No, it was three. Papadakos was not participating. It was perfectly divided.

THE COURT: Two of the three of them are gone.

MS. CRIBBINS: And they are asking you to rely on the reasoning of three of the justices, and the other three said no.

THE COURT: The parents in this case don't even have custody of these kids, and they are not foster parents, so.

MS. CRIBBINS: The reason it's not applicable, I would argue, they were adoptive foster parents and not foster parents.

MS. SIROKY: There is no such thing as adoptive foster parents.

MS. CRIBBINS: They have additional standing. They have –

THE COURT: They have no standing. This case couldn't be argued by them. They don't have custody of the children.

MS. CRIBBINS: Upon reversal –

THE COURT: Quote, "CYS has custody." That's another thing. They've never understood they've never had custody of the children. CYS has custody of the children with permission to place them by my order and by my instruction in the home of the Derzaks.

They've never had custody. That's a legal nicety that they've never understood in three or four years.

MS. CRIBBINS: Well, I beg to differ with you.

THE COURT: Read the orders. The orders say that – the order says that Byron and Byrae are dependent children and placed in the custody of CYS to be placed That's what the order says.

MS. CRIBBINS: I read that order ,and I didn't – that's not the standard juvenile court order.

MS. VAUPEL: Yes, it is.

THE COURT: I think that's what the standard juvenile court order says. That's what the law is. So maybe the Derzaks don't think this bit of particular law applies to them. They've never had independent custody of these children independent of CYS or the Court. All right. Anything else?

MS. VAUPEL: No, Your Honor.

THE COURT: We'll make a decision and get it out to you.

(Whereupon, this hearing was concluded.)

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE COURT LACKED JURISDICTION TO ENTER THE SUBJECT ORDER BECAUSE ALL MATTERS OF THIS CASE ARE ON APPEAL?

Answered in the negative by the court below.

II. WHETHER THE COURT LACKED JURISDICTION TO ENTER THE SUBJECT ORDER AS THE HONORABLE JOSEPH A. JAFFE WAS ONLY ASSIGNED TO THE ORPHAN'S COURT DIVISION FOR THE PURPOSE OF HEARING THE TERMINATION PROCEEDING WITH REGARD TO THE PARENTAL RIGHT OF LASHAWN JEFFREY?

Answered in the negative by the court below.

III. WHETHER THE SUBJECT ORDER OF COURT VIOLATES DUE PROCESS RIGHTS OF KAREN AND MICHAEL DERZACK?

Answered in the negative by the court below.

Supreme Court, U.S.
FILED
MAR 30 1998
CLERK

No. 97-1397

In The Supreme Court of the United States

OCTOBER TERM 1997

KAREN DERZACK AND MICHAEL DERZACK,

Petitioners,

v.

ALLEGHENY COUNTY CHILDREN AND YOUTH SERVICES,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTION PRESENTED

Petitioner foster parents' due process rights were not violated upon trial court's order to withdraw Respondent agency's Adoption filings and to dismiss the Report of Intention to Adopt filed by Petitioners for two foster children.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This Honorable Court should deny the Petition for Writ of Certiorari as the issue raised by Petitioners (the Derzacks) is now moot. This Honorable Court denied the Derzacks' Petition on March 9, 1998 at No. 97-1105 which alleged that their due process rights were violated regarding their foster children's removal. Thus, any issue concerning the trial courts order allowing withdrawal and dismissal of Allegheny County Children and Youth Services' (ACCYS) adoption filings in this case is now moot. ACCYS incorporates by reference its Brief in Opposition filed at No. 97-1105 in this matter.

Pursuant to the trial court's earlier removal of these children from the Derzacks on January 17, 1996, ACCYS presented on August 27, 1996 a Motion to Withdraw its Adoption Petition and Report of Intermediary, and to dismiss the Report of Intention to Adopt filed by the Derzacks. The trial court granted ACCYS' motion on that date.

The Derzacks then filed timely exceptions to the trial court's order which were denied by the court *en banc* after submission of briefs and oral argument on October 7, 1996.

The Derzacks filed an appeal to the Superior Court of Pennsylvania which was quashed upon motion of ACCYS on April 23, 1997.

The Derzacks then petitioned for allowance of appeal to the Supreme Court of Pennsylvania which was denied on November 25, 1997.

The Derzacks then filed a Petition for Writ of Certiorari to this Court.

REASONS FOR DENYING THE PETITION

A. This issue is now moot.

On March 9, 1998 at No. 97-1105, this Honorable Court denied the Derzacks' Petition for Writ of Certiorari regarding their claim that their due process rights were violated when their former foster children were removed from their care. The lower court found that the Derzacks had flagrantly violated several court orders designed to protect the children's best interests, and the Pennsylvania appellate courts upheld the lower court's order.

As this Court has declined to review any alleged due process violation pursuant to the children's removal from the Derzacks' home, this Court should also decline to review any alleged due process violation regarding the trial court's order disposing of the adoption filings in this case.

Once the trial court removed these children from the Derzack's home, they were no longer considered the adoptive resource for these children. As they were no longer the adoptive resource, the trial court properly ordered that the adoption filings be withdrawn and dismissed.

There is no legal reason for this Court to hear this case as it allowed to stand the order removing the children from the Derzacks. The Derzacks are not and will never be the adoptive parents for these children. Thus, it is now a moot issue concerning the legality of whether the court properly ordered the adoption filings to be withdrawn and dismissed.

B. The result in the Derzacks' case is not in conflict with any decision of this Court nor any other court.

The Derzacks argue that they have a fundamental liberty interest in the care and custody of two foster children pursuant to the Fourteenth Amendment to the United States Constitution which states in part "...nor shall any State deprive any person of life, liberty or property, without due process of law." They cite no authority for this argument, but suggest that their interests are akin to those of a natural parent. They attempt to buttress their fallacious argument by citing Santosky v. Kramer, 455 U.S. 745 (1982), however, the due process protections outlined in Santosky apply to natural parents, not foster parents nor adoptive foster parents. The Court also stated that the nature of due process was a balancing of the private interests of the natural parent, risk of error in the deprivation by the state and the countervailing government interest in the best interests of the child. *Id*, at 754. The Derzacks cite no authority for the balancing of those interests here.

Though Santosky clearly applies to the "liberty" interest that biological parents have in their children, do foster parents have any asserted interests within the "liberty" protected by the Fourteenth Amendment? This Court spoke

narrowly on this issue is Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816 (1977). In Smith, this Court declined to expand to foster parents a constitutionally protected liberty interest stating that "... there are also important distinctions between the foster family and the natural family. ... [T]he State...seeks to interfere, not with a relationship having its origins entirely apart from the power of the State, but rather with a foster family which has its source in state law and contractual arrangements." *Id,* at 845.

In addition, this Court denied an application for writ of mandate by a couple seeking reinstatement as prospective adoptive parents after the state had removed the child without notice in the child's best interests. Martin v. Thies, 446 U.S. 1320 (1980). Clearly, based upon the above authorities, the Derzacks have no fundamental liberty interest in these children.

C. There are no important issues at stake in this case.

The Derzacks argue that they are somehow due a hearing on the adoption petition filed by ACCYS on behalf of ACCYS and as a courtesy to the Derzacks when they were considered potential adoptive parents for these children. The Derzacks have no constitutional right to be heard on ACCYS' pleadings. Moreover, they were given notice of the presentation of the motion to dismiss these filings and they were represented by counsel at the hearing.

Most importantly, once the court *en banc* removed the children from the Derzacks' care after extensive hearings, the court no longer would permit them to adopt these children.

As the trial court stated, "... the Derzacks have

> no contact with the children, do not have physical custody of them and are not responsible for any decisions made on their behalf. They, therefore, have no parental relationship with them. Secondly, [23 Pa.C.S.A. Section 2711(a)(5) of the Adoption Act of 1980 *as amended*] requires that the child's guardian or the persons having custody of the child consent to the adoption. It is clear that the Derzacks have neither the consent of the persons with physical custody of the children [the children's new adoptive family] nor from the agency which functions as the legal guardian. Accordingly they cannot proceed with the Adoption Petition as filed by [ACCYS] on their behalf." (19A)[1]

The Derzacks cite absolutely no authority for any of their meritless arguments. They have had extensive hearings on the issue of the children's removal, and the best that can be said of their recent repetitive filing with this Court is that it is the desperate act of desperate people.

Their due process claim has no basis in law or fact and fails to present a compelling reason for review by the Court, and thus should be denied.

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[1]The designation "A" preceded by page numbers indicates location in the Appendix to the Petition for Writ of Certiorari.

CONCLUSION

This case is now moot and does not merit further review by this Court. For the foregoing reasons, the Derzacks' Petition should be denied.

Respectfully submitted,

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(A)

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

No. 97-1397

KAREN DERZACK AND MICHAEL DERZACK,

Petitioners,

v.

ALLEGHENY COUNTY CHILDREN
AND YOUTH SERVICES,

Respondent

On Petition for Writ of Certiorari to the
Supreme Court of Pennsylvania

REPLY BRIEF

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STATEMENT OF QUESTION PRESENTED

Did it violate due process of law to order the withdrawal of Petitioners' Adoption Petition and Report of Intermediary upon motion of the adverse party and the Dismissal of Petitioners' Report of Intention to Adopt without a hearing, proper notice, consent or any other safeguard of due process?

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REPLY BRIEF

REASONS FOR GRANTING THE PETITION

A. This issue has not been rendered moot.

On March 9, 1998 at No. 97-1105, this Honorable Court denied the Derzacks' Petition for Writ of Certiorari regarding their claim that their due process rights were violated when the minor children were removed from their care while the Derzacks were not foster parents but were prospective adoptive parents.

The mere fact that this Court declined to review the due process violation pursuant to the children's removal from the Derzacks' home does not mean that this Court should also decline to review the due process violation regarding the trial court's order disposing of the adoption filings of Petitioners.

Respondent argues that once the juvenile court removed the children from the Derzacks' home, they were no longer considered the adoptive resource for the children and that the order of the trial court was proper.

However, following the removal of the children, the Derzacks continued to have pending before the Orphans' Court, for eight months, their Petition for Adoption. Thus, an adoption hearing should, pursuant to law, have been scheduled. At said hearing, the court could have determined that the Derzacks, the prospective adoptive parents and the only parents known to one of the minor children for the majority of his life, were suitable as an adoptive family for the children.

B. There are important issues at stake in this case.

The Derzacks do not argue over the issue of the custody of foster children. The Derzacks were never a foster family for the minor children or ever a registered foster family. During the relevant time period, the Derzacks were the prospective adoptive parents for the minor children, as was noted by the Pennsylvania

Superior Court in its opinion on the case which was before this Honorable Court at No. 97-1105.

Respondent has attempted to label the Derzacks as foster parents rather than referring to their actual status as prospective adoptive parents despite the finding of the Pennsylvania Superior Court in terms of standing and the Derzacks' status.

As the trial court noted in its opinion of June 25, 1995 (See Appendix), the Derzacks were awarded final custody of the minor children in October of 1994 because of psychological bonding and the possible sexual abuse of the children by their siblings. The trial court then ordered Respondent, which was the subject of a lawsuit filed by Petitioners, to assist Petitioners in adopting the minor children.

Respondent proceeded to initiate contempt proceedings against Petitioners, among other allegations, for failing to push visitation between the

minor children and the siblings who had sexually abused the two and three year old minor children.

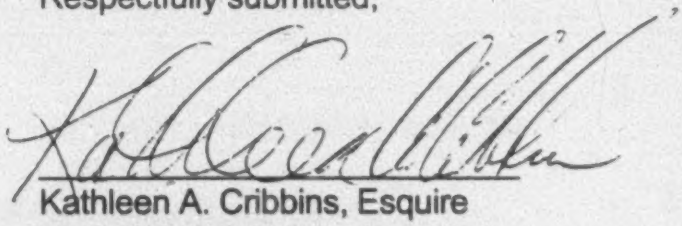
Prospective adoptive parents who are the only parents known to a child for the greater portion of this life, have a greater interest in and a far more important relationship with, said child than foster families.

In Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816 (1977), this Honorable Court declined to expand a constitutionally protected liberty interest to foster families. However, the Derzacks were not a foster family but a psychologically bonded adoptive family deserving of constitutional protection and of due process in the consideration of their Petition for Adoption (Santosky v. Kramer, 455 U.S. 745 (1982).

CONCLUSION

This case has not been rendered moot by the previous decision of this court and the Derzacks' Petition should be granted.

Respectfully submitted,



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APPENDIX

**EXCERPTS FROM OPINION OF
HON. JOSEPH A. JAFFE of June 25, 1995**

IN RE: Byron & Andre Jeffrey, Shondre & Wesley Barnes and Byrae Griffin

**DOCKET NO. 1608-92, 2622-25-91
IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA -
JUVENILE DIVISION**

. . . The second major point of contention raised by Mother in her Statement of Matters centered on the awarding of custody of Byron and Byrae to the Derzack family. Mother cites numerous errors related to this issue which we shall address in our general discussion of the basis for our decision granting custody to Mr. and Mrs. Derzack.

. . . . .

In light of all of the testimony at the numerous hearings and considering all factors relative to the best interests of Byron, this Court determined that Byron and Byrae should be placed in the custody of Mr. and Mrs.

Derzack. Among the factors this Court considered in making its determination, the most compelling were the psychological bonding between Byron and the Derzack family and between Byron and Byrae, and the serious concerns this Court has about the ability of Ms. Ellis to care for two additional young children. While race was an additional factor considered by this Court, it was not an overriding concern and ultimately, was outweighed by the other factors as will be discussed more fully below.

. . . .

In addition to the psychological reasons in favor of placing Byron and Byrae together, this Court also considered safety reasons which surfaced during two of the hearings. During the September 16, 1994 hearing and again at the October 5, 1994 hearing, evidence was presented that Mother's three older children who reside with Ms. Ellis were sexually abused by one of Mother's paramours and concern was expressed that Byron and Byrae were at risk of being possible victims of their

siblings. (Tr. 5 at 43-44, Tr. 6 at 253-254). Indeed the testimony established that there was reason to believe that Byron and Byrae may have been sexually abused by one or more of their three older siblings in September, 1994 while they were temporarily residing with Ms. Ellis (Tr. 5 at 43-44, Tr. 6 at 40-43).

Based upon that information this Court was very concerned about Byrae's safety if she were left in the custody of Ms. Ellis and Byron were placed with the Derzack family.

Thus, despite the absence of an established relationship between Byrae and Mr. and Mrs. Derzack, this Court felt that the evidence and case law supported her joint placement with Byron in the home of Mr. and Mrs. Derzack.